Supreme Court, U.S.
FILED
AUG 22 1997

No. 96-2016

In the Supreme Court of the United States

RICHARD D. DONOHOO, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM F. KROENER
General Counsel
JACK D. SMITH
Deputy General Counsel
ANN S. DUROSS
Assistant General Counsel
KATHRYN R. NORCROSS
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

RECEIVED
HAND DELIVERED
AUG 25 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the court of appeals correctly enforced an order of the Federal Deposit Insurance Corporation imposing civil monetary penalties on petitioners for violating the Change in Bank Control Act, 12 U.S.C. 1817(j), and engaging in other improper banking practices.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Atlas Roofing Co. v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977)	9
Austin v. *United States*, 509 U.S. 602 (1993)	9
City of Springfield v. *Kibbe*, 480 U.S. 257 (1987)	8
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	8
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989)	9
Rex Trailer Co. v. *United States*, 350 U.S. 148 (1956)	9
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943)	9
United States v. *Halper*, 490 U.S. 435 (1989)	9
United States v. *Ursery*, 116 S. Ct. 2135 (1996)	9
United States v. *Ward*, 448 U.S. 242 (1980)	8
United States v. *Williams*, 504 U.S. 36 (1992)	8
United States v. *Winstar Corp.*, 116 S. Ct. 2432 (1996)	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	7
Yee v. *City of Escondido*, 503 U.S. 519 (1992)	8

Constitution, statutes and regulation: Page

U.S. Const.:
Amend. VI 8
Amend. VII 7, 8, 9
Amend. VIII 7, 8, 9
Change in Bank Control Act of 1978, 12 U.S.C. 1817(j):
12 U.S.C. 1817(j) 2
12 U.S.C. 1817(j)(1) 6
12 U.S.C. 1817(j)(8)(B) 4, 7
12 U.S.C. 1817(j)(16) 8
12 U.S.C. 371c 2
12 U.S.C. 375b 2
12 U.S.C. 1818(e) 5
12 C.F.R. Pt. 215 2

In the Supreme Court of the United States

No. 96-2016

RICHARD D. DONOHOO, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8-A35) is reported at 103 F.3d 1409. The decision and order of the Federal Deposit Insurance Corporation (Pet. App. A41-A129) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A38-A40) was entered on January 8, 1997. A petition for rehearing was denied on March 21, 1997 (Pet. App. A36-A37). The petition for a writ of certiorari was filed on June 19, 1997.

STATEMENT

1. In September 1992, the Federal Deposit Insurance Corporation (FDIC) issued a Notice charging petitioners and others with violating the Change in Bank Control Act of 1978 (CBCA), 12 U.S.C. 1817(j), in connection with the issuance and acquisition of a controlling block of voting stock in Capital Bank (the Bank). See Pet. App. A42, A45-A46. Petitioners Donohoo, Mathies and Rasmussen were officers and directors of the Bank. Petitioner Godbout-Bandal was a shareholder of the bank.[1]

The Notice charged, among other things, that petitioners had violated the CBCA by causing the Bank to issue and sell a controlling block of voting stock without notice to the FDIC; that they had caused the Bank to sell the new stock to them at a price below its market value, in breach of their fiduciary obligations; and that they had financed their purchase of the stock with improper "insider" loans from the Bank or an affiliate, in violation of 12 U.S.C. 371c and 375b, 12 C.F.R. Part 215 (Regulation O), and a 1984 cease and desist order. See Pet. App. A54. The FDIC's enforcement counsel sought an order prohibiting petitioners Donohoo and Mathies from further participation in the banking industry, an order requiring all petitioners to cease and desist from

---

[1] The Notice also named Leonard Misenor, an officer and director of the Bank; Wayne Field, a shareholder of the Bank; and two law firms that represented both petitioners and the Bank. The FDIC later settled with Misenor and withdrew the charges against him. See Pet. App. A16 n.4. Field has not sought review of the court of appeals' decision enforcing the FDIC's order against him (see *id.* at A18-A20). The court of appeals declined to enforce the FDIC's order with respect to the law firms. *Id.* at A26, A30-A35.

violating applicable laws and regulations, and an order imposing civil monetary penalties.

Initial proceedings were conducted before an administrative law judge (ALJ). In September 1994, after a 12-day evidentiary hearing and the compilation of a "massive and complex" record, the ALJ issued a 260-page recommended decision, including 78 pages of factual findings. See Pet. App. A43-A45 & n.7. Both petitioners and the enforcement counsel filed exceptions to the ALJ's recommended decision and briefed the case before the FDIC's Board of Directors, which reopened the record on three occasions to obtain additional factual information. *Id.* at A44.

2. In September 1995, after reviewing the record and the pleadings and additional evidence submitted by the parties, the FDIC issued its final decision and order. Pet. App. A41-A129. As relevant here, the FDIC found that in 1988 petitioners Donohoo and Mathies acquired 24.9% of the stock of Capital City Corporation (CCC), together with an option to acquire the remaining shares. *Id.* at A46. CCC, in turn, owned 99% of the shares of the Bank. *Id.* at A47. Donohoo and Mathies quickly became officers and directors of the Bank, and by January 1989 they had taken control of its Board. *Id.* at A47-A48.

From 1988 to 1990, Donohoo and Mathies attempted unsuccessfully to arrange for themselves and other investors to acquire either CCC or the Bank. Pet. App. A47-A49. Because of losses at the Bank, the failure of the acquisition plans, and various security arrangements involving the shares of the Bank and CCC, "by July 1990 [petitioners] Donohoo, Mathies, * * * and Godbout-Bandal faced imminent loss of their considerable investment in gaining control of Capital Bank." *Id.* at A49. On June 28, 1990, the

Bank's Board (consisting of petitioners Donohoo, Mathies and Rasmussen) called a special meeting of stockholders for July 9, at which Donohoo voted CCC's shares in favor of issuing 7,000 new shares of Bank stock, more than doubling the 6,750 shares previously outstanding. *Id.* at A50-A51. Those shares were sold to petitioners and Wayne Field (see note 1, *supra*) on July 30, 1990, for $142.86 per share. *Id.* at A51-A53. Some of the purchases were financed with loans made by the Bank itself, or by another bank controlled by Donohoo. *Id.* at A56-A60.

Although acquisition of the new shares did not cause any individual investor to pass the 25% voting-power threshold that triggers the notice-and-approval requirements of the CBCA, see 12 U.S.C. 1817(j)(8)(B) (defining "control"), they did result in the new investors, as a group, owning 50.6% of the Bank's voting stock. Pet. App. A52 n.21. The shares were sold in 1992, as a controlling block, for $380.91 per share. *Id.* at A53; see *id.* at A16-A17.

The FDIC found that, in acquiring the newly issued shares of the Bank, petitioners acted in concert, "spearheaded by Donohoo and Mathies, but with the knowledge and cooperation of all." Pet. App. A52; see *id.* at A66-A75. Accordingly, it concluded that petition ers had violated the CBCA by acquiring a controlling interest in the Bank without notifying the FDIC and giving it the opportunity to disapprove the transaction. See Pet. App. A63-A65. The FDIC also concluded that petitioners had violated statutory and regulatory prohibitions on insider and affiliate loans (both in connection with acquisition of the newly issued Bank shares and in connection with the earlier efforts to acquire CCC or the Bank), had paid less than the fair market value for the new Bank

shares, and had engaged in unsafe and unsound practices, including giving false responses to state and federal bank examiners and causing the Bank to enter into abusively generous employment agreements with Donohoo and Mathies. *Id.* at A60, A78-A86.

The FDIC found that, in committing these violations, petitioners Donohoo and Mathies benefitted themselves financially, exposed the Bank to losses, prejudiced the interests of depositors, and demonstrated personal dishonesty and a willful and continuing disregard for the safety and soundness of the Bank. Pet. App. A115-A116. It therefore prohibited them from further participation in the banking industry. *Ibid.*; see also *id.* at A124-A125; 12 U.S.C. 1818(e). It ordered the other petitioners to cease and desist from violations of law or unsafe and unsound practices. Pet. App. A126-A127. Finally, after carefully considering the appropriate statutory factors (including, for example, financial resources, good faith, and the gravity of the violations), the FDIC ordered each petitioner to pay a civil money penalty equal to the sum of the penalty recommended by the ALJ ($75,000 for Donohoo, $50,000 for Mathies, $15,000 for Rasmussen and $30,000 for Godbout-Bandal) and the profits realized on the sale of the illegally acquired Bank stock ($925,554 each for Donohoo and Mathies, $23,600 for Rasmussen and $120,000 for Godbout-Bandal). *Id.* at A116-A122.

3. Petitioners sought review in the court of appeals, which sustained the FDIC's factual findings and enforced its orders with respect to petitioners. Pet. App. A8-A35. Rejecting (*id.* at A13-A18) petitioners' arguments based on the lack of a written agreement among them concerning the Bank's

shares, their reliance on the advice of counsel, and the nature and purpose of their conduct, the court held that "substantial evidence on the record as a whole supports the FDIC's finding that individual petitioners acquired control of Capital Bank through a concerted effort in violation of the CBCA" (*id.* at A13). After carefully reviewing the record evidence, the court similarly upheld the FDIC's factual findings and its conclusions regarding violations of various insider and affiliate loan prohibitions, the approval of abusive employment agreements, and misrepresentations to federal and state bank examiners. *Id.* at A20-A24. Finally, the court considered the remedial orders entered by the FDIC against petitioners and concluded that each was supported by substantial evidence and within the agency's discretion. *Id.* at A24-A28. The court therefore enforced the FDIC's orders in so far as they applied to petitioners. *Id.* at A35.

ARGUMENT

1. The Change in Bank Control Act (CBCA) provides in pertinent part that

> [n]o person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured depository institution through a purchase * * * of voting stock * * * unless the appropriate Federal banking agency has been given sixty days' prior written notice of such proposed acquisition and * * * has not issued a notice disapproving the proposed acquisition * * *.

12 U.S.C. 1817(j)(1). "Control" includes "the power, directly or indirectly, * * * to vote 25 per centum or

more of any class" of the institution's voting stock. 12 U.S.C. 1817(j)(8)(B). In this case, after thorough consideration of an extensive record, the FDIC found that petitioners, acting in concert, had acquired 50.6% of the voting shares of Capital Bank (the Bank) without notifying the FDIC or seeking its approval—*after* having been explicitly warned by the agency that the acquisition might violate the CBCA, and might result in the imposition of monetary penalties. Pet. App. A52, A63-A76 & n.39. In addition, it found that petitioners, particularly Donohoo and Mathies, had engaged in "egregious insider abuse" of their positions at the Bank (*id.* at A64), primarily involving loans to themselves and others to fund investments in the Bank itself or in its holding company. *Id.* at A58-A60, A78-A83.[2] The court of appeals thoroughly reviewed the record, considered the legal and evidentiary arguments made by petitioners in that court, and sustained the FDIC's findings, its conclusions, and the exercise of its remedial discretion. *Id.* at A13, A21-A28. Nothing in that determination warrants review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. In this Court, petitioners argue (Pet. i-ii, 13-15) that they have been deprived of a jury trial and subjected to excessive fines, and to cruel and unusual punishment, in violation of the Sixth, Seventh and Eighth Amendments to the Constitution. Petitioners

---

[2] Indeed, the FDIC found petitioners' testimony to the contrary to be "shockingly disingenuous" (Pet. App. A64), just as the administrative law judge, after conducting a 12-day hearing, "[q]uite simply * * * did not believe the testimony of the [petitioners]," finding some of it "not merely undeserving of credibility but * * * completely ludicrous" (*id.* at A57-A58). Compare Pet. 11.

did not raise any of those arguments before the court of appeals, and that court did not address them sua sponte.[3] They may not be raised for the first time in this Court. *E.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987); compare *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992).

In any event, petitioners' constitutional claims are without merit. The Sixth Amendment right to a "speedy and public trial" applies only in "criminal prosecutions." U.S. Const. Amend. VI; *United States* v. *Ward*, 448 U.S. 242, 248 (1980). The civil administrative proceeding at issue in this case led only to the imposition of penalties that Congress has expressly denominated as "civil." 12 U.S.C. 1817(j)(16). Such penalties may nonetheless be classified as constitutionally "criminal," if "the statutory scheme is so punitive either in purpose or effect as to negate [Congress's expressed] intention"; but the Court has made clear that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Ward*, 448 U.S. at 248-249 (internal quotation marks omitted).

In this case, the monetary penalties originally recommended by the administrative law judge (ALJ), ranging from $15,000 to $75,000 (Pet. App. A116), are relatively modest in the context of sophisticated,

---

[3] Petitioners' brief in the court of appeals included only two points in its "statement of the issues": Whether the FDIC's (i) prohibition orders and (ii) cease-and-desist order and imposition of monetary penalties should be reversed, in each case "because they are unsupported by substantial evidence and because they are premised upon erroneous legal conclusions." Pet. C.A. Br. 2.

highly paid bank officers and investors with substantial capital; and they serve remedial purposes closely related to the maintenance of safety, stability, and honest and prudent management in "one of the longest regulated and most closely supervised of public callings" (*United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2440 (1996)). See *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943); cf. *United States* v. *Ursery*, 116 S. Ct. 2135, 2149 (1996). To those penalties, the FDIC added amounts calculated to force petitioners to disgorge the profits they received from their acquisition of Bank shares in violation of the CBCA. See Pet. App. A65-A66, A116. Although that disgorgement substantially increased the size of penalties imposed, it requires petitioners only to give up what they gained from the sale of their controlling stake in the Bank, and it is plainly civil in nature, serving "the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts." *Ursery*, 116 S. Ct. at 2148-2149.

For similar reasons, the civil monetary penalties imposed against petitioners are not "punishment," and certainly are neither "excessive" nor "cruel," for purposes of the Eighth Amendment. Compare *Austin* v. *United States*, 509 U.S. 602 (1993); see *Ursery*, 116 S. Ct. at 2146-2147; cf. *United States* v. *Halper*, 490 U.S. 435 (1989). Nor did petitioners have any right under the Seventh Amendment to trial in a court or by a jury in this administrative enforcement case. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); compare *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-55 (1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

WILLIAM F. KROENER
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

KATHRYN R. NORCROSS
Counsel
Federal Deposit Insurance Corporation

AUGUST 1997